STATE OF MICHIGAN

IN THE SUPREME COURT

RANDALL G. PAIGE ~~(Deceased),~~

Plaintiff-Appellee,

-v-

CITY OF STERLING HEIGHTS, Self Insured,
~~c/o~~ ACCIDENT FUND COMPANY,

Defendant-Appellants.
_____/

SC#_____

COA#256451

WCAC#030085

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DEFENDANT-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

NOTICE OF HEARING

PROOF OF SERVICE

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TABLE OF CONTENTS

INDEX TO AUTHORITIES

Page

Cases

Statutes

Other References

STATEMENT IDENTIFYING THE JUDGMENT OR ORDER APPEALED AND RELIEF SOUGHT

Defendant-Appellant appeals the Court of Appeals Order denying Application for Leave to Appeal dated January 10, 2005.

Defendant-Appellant requests this Court grant Application for Leave to Appeal and reverse the Court of Appeals denying Application; reverse the Workers' Compensation Appellate Commission affirming the Magistrate's opinion and order; and reverse the Magistrate's opinion and order granting Plaintiff-Appellee benefits for the reasons stated in Defendant-Appellant's Brief. Alternatively, Defendant-Appellant requests this Court reverse the Court of Appeals order denying Application and order the Court of Appeals to grant Application.

STATEMENT OF QUESTIONS PRESENTED

I

PLAINTIFF'S 1991 HEART ATTACK WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S DEATH IN 2001

Defendant-Appellant answer "Yes."
Plaintiff-Appellee answers "No."
Board of Magistrates answer "No."
Workers Compensation Appellate Commission answer "No."
Court of Appeals did not answer.

II

PLAINTIFF'S SON IS NOT ENTITELD TO 500 WEEKS OF DEATH BENEFITS PURSUANT TO SECTION 375.

Defendant-Appellants answer "Yes."
Plaintiff-Appellee answers "No."
Board of Magistrates answer "No."
Workers Compensation Appellate Commission answer "No."
Court of Appeals did not answer.

III

DEFENDANT IS ENTITLED TO SET OFF "LIKE BENEFITS" PAID TO PLAINTIFF PURSUANT TO SECTION 161 AGAINST THE DEATH BENEFITS AWARDED PURSUANT TO SECTION 321

Defendant-Appellants answer "Yes."
Plaintiff-Appellee answers "No."
Board of Magistrates answer "No."
Workers Compensation Appellate Commission answer "No."
Court of Appeals did not answer.

BASIS OF JURISDICTION

The Supreme Court has jurisdiction over this Application for Leave to Appeal by virtue of MCR 7.301(2) (appeal after decision by the Court of Appeals), MCLA 418.861a(14) (appeals from Workers Compensation Appellate Commission (WCAC)).

The WCAC order appealed to the Court of Appeals was mailed on June 2, 2004. The Court of Appeals order denying Application for Leave to Appeal was mailed January 10, 2005. This Supreme Court Application for Leave to Appeal is being filed within 21 days thereafter. MCR 7.302(C)(2).

STANDARD OF REVIEW

The issues presented in this Application for Leave to Appeal presents important questions that the Supreme Court should address. The issues presented are issues of first impression and question the validity of applicable statutes. The issues presented are issues that are likely to be reoccurring issues of public interest and are ripe for Supreme Court review.

In *Mudel v Great Atlantic & Pacific Tea Co,* 462 Mich 691 (2000), the Court stated:

> In worker's compensation cases, there are two separate levels of review: administrative review and judicial review. As explained in *Holden, supra,* [1] the WCAC reviews the magistrate's findings of fact under the "substantial evidence" standard, while the judiciary reviews the WCAC's findings of fact under the "any evidence" standard. These two standards of review are separate and distinct; they originate from different statutory sources and serve different purposes." *Id.* At 698.
>
> Relying on *Holden,* the *Mudel* Court stated:
>
> . . . judicial review by the Court of Appeals or this Court of a WCAC decision is to be of the findings of fact made by the WCAC and not the findings of fact made by the magistrate . . .
>
> . . . the role of the WCAC is to ensure that factual findings are supported by the requisite evidence, while the role of the judiciary is to ensure the integrity of the administrative process. The WCAC is required by MCL 418.861a(13); MSA 17.237(861a)(13) to employ a "qualitative and quantitative analysis" of competing evidence, on consideration of the whole record, and determine the level of support for the magistrate's factual findings . . .
>
> . . . The *Holden* formulation of judicial review, which requires the courts to ensure that the WCAC did not "misapprehend or grossly misapply" the "substantial evidence" standard, means that the judiciary must ensure that the WCAC did not misapprehend its administrative appellate role in reviewing decisions of the magistrate . . . *Id.* at 701-704.

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[1] Holden v Ford Motor Co, 439 Mich 257 (1992)

STATEMENT OF PROCEEDINGS AND FACTS

a. Procedural History and Factual History

Plaintiff was a firefighter for the City of Sterling Heights from September 29, 1974 until October 12, 1991 (M2)[2]. Plaintiff smoked one (1) pack of cigarettes per day, was slightly overweight, had a slightly elevated cholesterol level, and had no previous heart problems. Plaintiff's family had no history of heart disease (M2).

On October 12, 1991, Plaintiff experienced symptoms consistent with a myocardial infarction. These symptoms started after Plaintiff performed his duties as a firefighter on a particularly busy day (M2). Plaintiff was subsequently diagnosed as having a myocardial infarction. Thereafter, Plaintiff filed an Application for Mediation or Hearing alleging a compensable condition pursuant to the Act. A hearing was held before Magistrate Donald G. Miller.

At the hearing, Plaintiff testified that he received his base pay, longevity, and medical coverage pursuant to Blue Cross in accordance with his "duty disability" classification (M2). Plaintiff's Exhibit No. 3 was a letter dated June 15, 1992 indicating Plaintiff was eligible for full wages and benefits under his duty disability retirement, and, after 25 years of regular service, the duty disability retirement would be converted to a regular retirement.

Expert witness testimony presented at the 1993 hearing consisted of Dr. Mark Goldberg, MD, and Dr. Thomas Petz, MD.

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[2] "M" refers to Opinion and Order signed by Magistrate Donald G. Miller on June 15, 1993.

Magistrate Miller determined Dr. Goldberg was Plaintiff's primary treating physician from November 6, 1991 until December 9, 1992 (M2-3). Magistrate Miller stated:

> . . . Dr. Goldberg was of the opinion that plaintiff's heart attack was stress-induced on his job as a firefighter on October 12, 1991. He stated that the damage to heart tissue was ***not extensive*** and plaintiff's prognosis was *good*, but he continues to have palpitations, elevated blood pressure and high levels of cholesterol (M3) (emphasis added).

Magistrate Miller noted that Dr. Petz was of the opinion Plaintiff suffered from arteriosclerotic heart disease and a previous myocardial infarction (M3). Dr. Petz was of the opinion Plaintiff's heart attack was not work related (M3).

Magistrate Miller determined Plaintiff was paid duty disability pension benefits and these benefits were "like benefits" subject to coordination. Specifically, Magistrate Miller held:

> Plaintiff elected benefits provided by the City of Sterling Heights. These benefits are referred to as "Duty Disability Benefits." The Act is entitled "Worker's Disability Compensation Act of 1969." The benefits provided by the City of Sterling Heights are being paid because of plaintiff's disability and the Act similarly deals with disability. To arrive at a conclusion that benefits under the Act and the benefits being paid to plaintiff by the City of Sterling Heights are not "like benefits" within the meaning of Section 161 would require the assignment of a meaning to the word "disability" other than the obvious and clear intent of the City of Sterling Heights and the legislature to provide, by means of these programs, for disabled employees. The conclusion is that plaintiff's duty disability benefits are like benefits. (M6).

Finally Magistrate Miller concluded:

> I FIND that plaintiff suffered a personal injury on October 12, 1991 arising out of and in the course of his employment with defendant.
>
> I FURTHER FIND that plaintiff was disabled as a result of said injury, and remains disabled as of the date of this order.
>
> . . .

I FURTHER FIND that the benefits being received by plaintiff from the City of Sterling Heights are "like benefits" and Section 161 of the Act applies to plaintiff.

. . .

ORDER

IT IS ORDERED that plaintiff be and hereby is awarded wage loss benefits at the rate of $430.00 per week until further order of the Bureau, said wage loss benefits subject to plaintiff's election under Section 161 of the Act.

. . .

Magistrate Miller's opinion and order remained in effect until July 1, 1998. On July 1, 1998, Plaintiff filed an Application for Mediation or Hearing after his duty disability pension benefits were converted to regular retirement pension benefits. In his Application for Mediation or Hearing, Plaintiff alleged:

> Benefits are to be paid under Workers Compensation decision dated 06/28/93 awarding wages in the amount of $430.00 weekly as an open award. Benefits have been stopped by the City of Sterling Heights in violation of the order. Penalties are hereby requested in the amount of $1,500.00.

As a result of Plaintiff filing an Application for Mediation or Hearing in July 1998, a hearing was held on July 22, 1999 before Magistrate Andrew G. Sloss (S1)[3].

Magistrate Sloss noted that after being granted an open award from Magistrate Miller in 1993, Plaintiff received a "PA 345" disability pension in the amount of $1,838.00 per month, which was 50% of Plaintiff's gross income while working, and an "Article 2" pension from the City of Sterling Heights in the amount of $862.00 biweekly (S2). Magistrate Sloss noted Plaintiff received his duty disability pension until May 21, 1998, at which time he was "regularly retired" (S2). Thereafter, Plaintiff received regular retirement pension benefits.

[3] "S" refers to Opinion and Order signed by Magistrate Andrew G. Sloss on April 19, 2000

Defendant was of the position that the regular retirement pension benefits paid to Plaintiff continued to be "like benefits" subject to Section 161(1)(c) of the Act, absolving Defendant of liability for payment of any weekly wage loss benefits pursuant to the Act (S3). Magistrate Sloss, citing Section 354 of the Act, determined the regular retirement pension benefits paid to Plaintiff were subject to coordination provisions pursuant to Section 354(1)(e) of the Act, and not "like benefits" pursuant to Section 161(1)(c) of the Act (S4). Magistrate Sloss held: ". . . Plaintiff remains entitled to receipt of weekly wage-loss benefits under the [A]ct, subject to reduction under Section 354(1)(e) of the [A]ct to the extent of the employer's contribution to the retirement benefit." (S4). After discussing Plaintiff's recent withdrawal from the pension account and roll over of Plaintiff's contributions into a separate account, Magistrate Sloss determined:

> Defendant may therefore coordinate 87.44% [representing the employer's contributions] of Plaintiff's weekly pension benefit against his wage-loss benefit rate. Plaintiff's after-tax weekly pension benefit rate was $545.13 in 1998, and $547.53 in 1999. Accordingly, Defendant is entitled to coordinate $476.66 against Plaintiff's workers' compensation wage-loss benefits in 1998, and $547.53 against those benefits in 1999. Given that Plaintiff's workers' compensation rate is $430.00 per week, Defendant's entire liability for wage loss benefits is currently completely extinguished due to coordination of his pension benefits. (S4-5).

Plaintiff suffered a second myocardial infarction in the early morning hours on August 15, 2000. Plaintiff was diagnosed with having advanced coronary artery disease and underwent a quadruple bypass. In 1991, at the time of the first myocardial infarction, Plaintiff only had between 50% to 60% of two (2) arteries blocked. In 2000, Plaintiff had one (1) artery 100% blocked, one (1) artery between 70% to 90% blocked, and two (2) arteries 80% blocked.

On January 4, 2001, Plaintiff died in his sleep. The survivor(s) (hereinafter referred to as "Plaintiff") filed an Application for Mediation or Hearing on January 15, 2001. That Application was withdrawn at the request of Plaintiff's counsel in an Order mailed January 31, 2002. The present action is the resultant of the Application for Mediation or Hearing filed on or about February 29, 2002. In this Application, Plaintiff alleged:

> Employee suffered a myocardial infarction on the job. Benefits awarded pursuant to an Order by Magistrate Miller on June 28, 1993 as an open award in the amount of $430.00/wk. Employee's spouse is also entitled to benefits under Section 345 of the Act for Funeral and burial expenses.

Based on Plaintiff's February 28, 2002 Application for Mediation or Hearing, a hearing was held on January 6, 2003 before Magistrate Andrew G. Sloss.[4] Plaintiff presented the deposition transcripts of Dr. Mark Goldberg, MD, and Dr. Eldred G. Zobl, MD. Defendant presented the deposition transcript of Dr. Gerald Levinson, MD.

Magistrate Sloss found:

> Prior decisions of the Bureau have established that Plaintiff sustained a work-related injury in the nature of a myocardial infarction on October 12, 1991. Plaintiff passed away on January 4, 2001, with the cause of death listed as "acute myocardial infarction" and "coronary artery disease." Plaintiff alleges that the death is a result of the work-related injury.
>
> . . .
>
> In the instant case, Magistrate Donald G. Miller ruled that Plaintiff had a work related myocardial infarction on October 12, 1991. The present dispute is whether that injury was "the proximate cause" of his death on January 4, 2001 (SS4).

After reviewing selected portions of the deposition transcripts and rules of law pertaining to "proximate cause", Magistrate Sloss held:

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[4] "SS" refers to refers to Opinion and Order signed by Magistrate Andrew G. Sloss on February 14, 2003

It is the inescapable conclusion from the testimony of all three doctors in this matter that Plaintiff's demise is directly traceable to the initial work-related injury in 1991. All three doctors agreed that it was a combination of underlying coronary artery disease together with the cumulative damage to the heart that began with his work-related myocardial infarction in 1991 that caused the fatal arrhythmia on January 4, 2001. I therefore conclude and find as fact that Plaintiff's work-related myocardial infarction in 1991 was the proximate cause of his death for purposes of Section 375(2) of the [A]ct (SS5).

After determining Plaintiff's 1991 heart attack was "the proximate cause" of Plaintiff's 2001 fatal arrhythmia, Magistrate Sloss determined what benefits, if any, were due Plaintiff's survivors.

Magistrate Sloss held:

Plaintiff is therefore entitled to the statutory death benefit of Section 321 provided that he left a dependent. Dependency is determined as of the date of the injury. MCL 418.341 (parallel citations omitted). Where a work-related injury is the proximate cause of the death of the employee, a dependent's right to receipt of death benefits is fixed as of the date of the original injury. *Bay Trust Company v Dow Chemical Company,* 326 Mich 62, 71 (1949) (parallel citations omitted). In this case, Magistrate Miller ruled that Adam Paige was a dependent of Plaintiff on the initial date of injury, October 21, 1991, therefore Defendant is responsible for death benefits pursuant to Section 375(2) of the Act.

Defendant asserts that under Section 375(2) the set-off it is entitled to is the number of *weeks* of benefits it previously paid, rather than the *amount* of benefits previously paid. Such an interpretation cannot be maintained given the plain language of the statute. The statute refers to the death benefit being a "sum" to be set-off against the "indemnity which at the time of death has been paid," and that it should be "equal to the full amount which such dependents . . . would have been entitled to receive." MCL 418.375(2) (parallel citations omitted). These phrases all indicate the payment of money, rather than the running of a period of time. Accordingly, Plaintiff is entitled to 500 weeks of weekly benefits, less compensation previously paid by Defendant. MCL 418.321 (parallel citations omitted).

Magistrate Miller found Plaintiff's weekly benefit rate to be $430.00 per week. Section 375(2) states, in pertinent part, that the benefits shall be payable:

". . . in same manner as they would be payable under the provisions of section 321 had the injury resulted in immediate death." MCL 418.375(2) (parallel citations omitted).

> This language indicates that the benefits payable to Plaintiff accrued as of his date of injury, October 12, 1991, and are therefore payable in a lump sum in the amount of $215,000 immediately. Defendant had been coordinating Plaintiff's weekly benefits, but death benefits are not coordinatable [MCL 418.354(1) (parallel citations omitted)], accordingly Defendant is entitled to no set-off against the accrued benefit amount. Plaintiff shall also be entitled to interest pursuant to Section 801 of the Act. MCL 418.801(6) (parallel citations omitted). (SS5-6).

Defendant appealed Magistrate Sloss' 2003 opinion and order to the WCAC. Specifically, Defendant argued Magistrate Sloss was wrong in determining Plaintiff's 1991 heart attack was "the proximate cause" of his death in 2001; Magistrate Sloss was wrong in determining the dependency of Plaintiff's survivors on the date of injury rather than on the date of death; Magistrate Sloss was wrong in not distinguishing Plaintiff's survivors as being either partially or wholly dependent on the date of death; Magistrate Sloss was wrong in awarding Plaintiff's survivor benefits from the date of injury and not from the date of death; and, Magistrate Sloss was wrong in awarding Plaintiff's survivor benefits at a rate not taking into consideration the "like benefits" Plaintiff received from 1991 to 1998.

The WCAC[5] held:

> . . .We are satisfied, however, that the magistrate relied on competent medical expert opinion testimony, as reflected in the above quoted testimony from Dr. Goldberg and Dr. Zobl, in reaching his conclusions and do not disturb them here. Where, as here, the factual determinations of the magistrate are challenged in such a way as to offer a reinterpretation of evidence offered at trial asking us to reweigh key portions of the record differently then did the magistrate, we will decline to do so as such action does not comport with our standard of review. *Jamison v General Foods Corp,* 1997 ACO #598. (W7)

In regards to the issue of dependency, the WCAC stated:

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[5] "W" refers to the WCAC Opinion and Order mailed June 2, 2004.

We interpret *Murphy*[6] to stand for the proposition that where ther is a child under the age of 16 at the time of injury, it is at that point that Sec. 341 operates to identify the dependent and to establish to what extent they are dependent. Such a finding was made in this matter by Magistrate Miller's decision . . . *Murphy* clearly providees that once a dependent under 16 is identified, they are automatically entitled to the 500 week death benefit provided under Sec. 321. *Murphy* lists no corollary that conclusive dependents who turn 16 during that 500 week period are subject to being reclassified as partial dependents. We decline to wander from the framework of that ruling.

Magistrate Sloss's opinion . . . did not grant benefits on an open award basis. Rather, he ordered the 500 week death benefit. As the order did not involve payment of benefits for any period after 500 weeks, there is no error in his not reviewed Adam's extent of dependency. *Murphy* does permit a review of the extent of dependency in cases where the child dependent is over 16 when the 500 weeks expire, requiring that the child prove a "conditional need" for benefits. In this case the award did not exceed that 500 week period. (W14).

In regards to the issue of death benefits under Sec. 375 constitute a weekly payment from date of death until 500 weeks from the date of injury, the WCAC held:

. . . The application of Sec 375(2) to the circumstances herein requires payment of the full amount that Mr. Paige would have been entitled to receive under Sec. 321, which benefits are not subject to coordination under Sec. 354(1)(e).

b. <u>Expert Witness Testimony</u>

Dr. Goldberg was first called to testify for Plaintiff on March 11, 1993[7]. The Application for Mediation or Hearing pending before the Bureau at that time concerned "like benefits" and "disability"; it did not concern Plaintiff's heart condition or underlying arteriosclerosis. Dr. Goldberg testified in 1993 that he was of the opinion Plaintiff had recovered from the 1991 heart attack. Dr. Goldberg testified in the following manner:

Q: . . . Let me ask you this. At this juncture am I correct in my interpretation what you said to [Plaintiff's counsel], and please

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6 *Murphy v Ameritech*, 221 Mich App 591 (1997).

7 "G" refers to the deposition of Mark Goldberg, M.D., taken on behalf of Plaintiff on March 11, 1993.

correct me if I am wrong, at this juncture his disability is primarily the coronary disease? That's the limiting factor?

A: Yes.

Q: Okay. But you have some concern from a prophylactic standpoint or preventative standpoint that he could have another infarction at some later point?

A: Yes.

Q: Given the underlying arterial disease, but the infarction he had in 1991, he has pretty much recovered from that I think you said?

A: Yes.

(G31).

Dr. Goldberg again testified for Plaintiff on January 9, 2002. Dr. Goldberg testified that he continued to treat Plaintiff after his initial heart attack in 1991 (GG6).[8] Dr. Goldberg stated that for several years Plaintiff's periodic visits were routine and uneventful (GG7, 28, 30-35, 41-42, 46).

On August 15, 2000, Plaintiff was hospitalized for another acute heart attack—the onset was at home first thing in the morning (GG7, 37-38). A cardiac catheterization identified the need for a quadruple bypass as Plaintiff's coronary artery disease was far advanced. Whereas in 1991 two coronary vessels were occluded to the extent of 50% and 60%, by August 2000 one vessel was 100% occluded, another varied from 70% to 90%, and two more were at 80% (GG8-9, 38, 49-50). Dr. Goldberg acknowledged that coronary artery disease is a progressive condition (GG9, 36, 39-41).

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[8] "GG" refers to the deposition of Mark J. Goldberg, M.D., taken on behalf of Plaintiff on January 9, 2002.

Dr. Goldberg said that after the August 2000 heart attack the EKG was still essentially normal, though cardiac catheterization indicated some left hypokinesis (reduced motion) where in 1991 there had been akinesis (without motion) (GG9, 28-29). This would have been due to the coronary artery disease itself or it could have resulted from the August 2000 heart attack, or it quite likely was related to the 1991 heart attack (GG13-15, 42-43).

Plaintiff again underwent cardiac rehabilitation. Plaintiff saw Dr. Goldberg in September and November 2000, and his cardiac status was stable and he was doing well (GG17-18).

As stated above, Plaintiff died on January 4, 2001, apparently in his sleep. On the death certificate, Dr. Goldberg attributed Plaintiff's death to an immediate cause of acute myocardial infarction due to (or as a consequence of) coronary artery disease that was present for years (GG19, 36-37, 51; Plaintiff's Exhibit 1—death certificate and autopsy report). The coronary artery disease did increase Plaintiff's risk of having a heart attack (GG 25, 50-51, 54-56).

Dr. Goldberg testified that at the time of Plaintiff's death, all four bypass grafts were **completely** blocked, and that could explain Plaintiff's death from either a myocardial infarction or a cardiac arrhythmia (GG30, 36). Even Plaintiff's witness, Dr. Zobl, discussed in more detail below, testified that Plaintiff's cause of death was either a third myocardial infarction or a cardiac arrythmia (Z14, 15, 21, 42, 43). Dr. Goldberg speculated, however, that a small area of damage to the left ventricle in 1991 *could* have contributed in an accumulative effect to cause dysfunction of the left ventricle, which in turn *could* then contribute or play a role

in the risk of sudden cardiac death (GG22-25, 48). Dr. Zobl was of the opinion the 2000 heart attack was not a recurrence of the 1991 heart attack because it occurred in another area of the heart (Z37).

Dr. Levinson examined Plaintiff on October 9, 2000 at Defendant's request (L11).[9] History at time of examination was that Plaintiff had done rather well after 1991 and until August 15, 2000, when at home at 7:00 a.m. Plaintiff suffered a second heart attack (L12). After bypass surgery, he was home in five days and, by the time of examination, was doing yard work and household chores and had been in cardiac rehabilitation for two weeks (L12-13).

Dr. Levinson concluded that the bypass surgery was the result of the coronary artery disease and was not related to the 1991 myocardial infarction, though he recognized that that was a judgment call since one might argue the meaning of the *statistic* that a person who has had a heart attack is more likely to have another (L17). In this case, the second heart attack involved a different coronary vessel than the first, revealing the multi-vessel nature of the disease (L33). His view of that statistic is that the first heart attack brings to light the underlying progressive heart disease. Dr. Levinson's opinion took into account that Plaintiff did not have significant heart damage in 1991 (L39).

Dr. Levinson thereafter reviewed records as to Plaintiff's January 4, 2001 death (L19). He concluded that, "[i]f you look at the immediate cause, it was absolutely because of the total shutdown and closure of all four new coronary artery bypass grafts" (L 23). Plaintiff had inadequate circulation because of that

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[9] "L" refers to the deposition of Gerald Jay Levinson, D.O., taken on behalf of Defendant on August 26, 2002.

uniform and collective shutdown of the grafting (L21-22). Again, the relationship to the 1991 myocardial infarction was simply that that injury showed that Mr. Paige had coronary artery disease (L36).

Dr. Zobl did a record review on Plaintiff's behalf (Z9).[10] Dr. Zobl noted that the August 2000 heart attack was not a recurrence of the first one, but occurred in a different part of the heart (Z 37). There was considerable occlusion in more than one coronary artery, and it was because of those occlusions that Plaintiff had the quadruple bypass (Z37-38).

Dr. Zobl could not be certain of the immediate cause of death, whether there was a third myocardial infarction or a lethal arrythmia provoked by an ischemic episode (Z14, 15, 21, 42, 43). That the four bypass grafts had all occluded was strange and he could not account for it (Z43). He agreed that each of the cardiac episodes was a complication of the progression of the underlying coronary artery disease (Z 22, 39-40).

Regarding the left ventricle damage from the 1991 heart attack, Dr. Zobl opined that, although the heart remodels itself to take over the function of the damaged part, over time there can be overall loss of function. However, looking at the records from 1998 to 2000, there were few complaints of chest pain (Z31-33), and congestive heart failure did not appear to be a factor (Z42-43). Nonetheless, Dr. Zobl opined that the coronary artery disease was not the only proximate cause of death, but the ventricle damage was as well (Z45, 46, 48, 50).

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[10] "Z" refers to the deposition of Eldred G. Zobl, M.D., taken on behalf of Plaintiff on July 30, 2002.

I

PLAINTIFF'S 1991 HEART ATTACK WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S DEATH IN 2001

On appeal, the WCAC affirmed Magistrate Sloss' determination that Plaintiff's 1991 heart attack was the proximate cause of Plaintiff's death in 2001 (W7, 9)[11].

Causation is to be determined pursuant to "the proximate cause" standard in MCL 418.375(2), which is applicable in non-immediate death cases. That section provides in pertinent part:

> If the injury received by such employee was ***the*** *proximate cause* of his or her death, and the deceased employee leaves dependents, as hereinbefore specified, wholly or partially dependent on him or her for support, the death benefit shall be .... [Emphasis added.]

What is in dispute is the meaning and application of the statutory phrase "**the** proximate cause." The meaning of statutory language presents a question of law that is reviewed *de novo*.

In *Hagerman v Gencorp Automotive*, 457 Mich 720 (1998), a 4-3 majority refused to reconsider the holding in *Dedes v Asch*, 446 Mich 99 (1994), a governmental immunity case, that the phrase "the proximate cause" does not mean "the *sole* proximate cause." The Supreme Court reversed the WCAC and the Court of Appeals and concluded that benefits were due because "the injury was the primary moving or substantial cause of the death," and the injury was a substantial factor because it "began a clear and unbroken chain of events that led to the decedent's death."

[11] "W" refers to Opinion and Order mailed by the WCAC on June 2, 2004

Defendant submits that *Hagerman* was, however, implicitly overruled by *Robinson v City of Detroit*, 462 Mich 439 (2000), another governmental immunity case in which the Court reconsidered and overruled *Dedes*. In *Robinson,* the Court said that the phrase "the proximate cause" as used by the Legislature is best understood as meaning "the one most immediate, efficient and direct cause preceding an injury." *Id.* at 459.

The *Robinson* analysis, while specifically addressing the governmental immunity statute as in *Dedes*, nevertheless must control the present reading of Section 375(2).

In *Robinson*, 462 Mich at 461-462, the Court expressly agreed with and quoted the following analysis by the dissent in *Hagerman*, 457 Mich at 753-754, regarding Section 375(2):

> Traditionally in our law, to say nothing of our classrooms, we have recognized the difference between "the" and "a." "The" is defined as "*definite article.* 1. (used, esp. before a noun, with a specifying or particularizing effect, *as opposed to the indefinite article or generalizing force of the indefinite article* a *or* an). ..." Random House Webster's College Dictionary, p 1382. Further, we must follow these distinctions between "a" and "the" as the Legislature has directed that "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language...." MCL 8.3a. Moreover, there is no indication that the words "the" and "a" in common usage meant something different at the time this statute was enacted.... [Emphasis in original.]

This quote from the dissent in *Hagerman* reflects "the heart" of the *Robinson* position, as the Court observed in *State Farm Fire & Casualty Co v Old Republic Insurance Co*, 466 Mich 142 (2002). In *State Farm*, the Court reiterated from *Robinson* that a "difference exists between the indefinite article 'a' and the definite article 'the.'" The Court found that analysis from the governmental immunity case to be controlling in

construing a provision of the no-fault automobile insurance act, stating, "We are not free to conflate their meanings."

Further, the *Robinson* Court reasoned that the Legislature's awareness of the difference between "a proximate cause" and "the proximate cause" was demonstrated by the pattern of statutes that used one phrase or the other. *Id.* at 460. At least five (5) statutes used "a proximate cause," while the governmental immunity act was among at least 13 statutes *that included Section 375(2) of the WDCA* using "the proximate cause." Thus the Court used Section 375(2) as part of the proof that "the proximate cause" means "the proximate cause" and not "a proximate cause."

Additionally, the *Robinson* Court believed that in *Dedes* it had "no authority" to contradict the statute's clear terms, *i.e.*, "the proximate cause," based on a lack of legislative history indicating that the Legislature affirmatively meant "the" rather than "a." *Id.* at 460. The *Robinson* Court's analysis applies equally to *Hagerman*, where the majority had expressly stated that it was "look[ing] to the common law to understand the meaning of the phrase 'the proximate cause' in the WDCA." The *Hagerman* majority had also reasoned that the limit of proximate cause is a matter of public policy for it to decide on a case by case basis.

In Magistrate Sloss' opinion and order, rather than follow *Robinson,* Magistrate Sloss stated that the proper interpretation was the "substantial factor" test from *Hagerman*—"The relevant inquiry should focus on whether the disability was caused by or is directly traceable to the initial work-related injury" (SS4). Magistrate Sloss' analysis of the record was that Plaintiff's demise was "directly traceable" to the initial work-related injury in 1991 (SS5). Magistrate Sloss did not apply the statute as it is

written in accord with the precepts set forth in *Robinson*. The WCAC subsequently committed legal error when it affirmed Magistrate Sloss' misapplication.

The WCAC held:

> We are satisfied, however, that the magistrate relied on competent medical expert opinion and testimony . . . in reaching his conclusions and do not disturb them here. (W7)

To the contrary, the WCAC later conceded the medical expert opinions and testimonies were in direct conflict with Magistrate Sloss' findings:

> Alternatively, defendant argues that the magistrate failed to make findings as to the "immediate" cause of plaintiff decedent's death and urges the Commission to make it's own findings in that regard. Once again, defendant takes the magistrate to task for making the wrong conclusion about the facts testified to by the medical experts, i.e. that "all three doctors" agreed that arrhythmia was the cause of death and that accumulative heart damage was a contributing cause. [footnote omitted]. We believe, **academically speaking, defendant is quite accurate in pointing out that certain interpretations of portions of the testimony of Dr. Goldberg and Dr. Levinson are flatly contradictory of the magistrate's above stated finding.** [emphasis added] (W8).

Magistrate Sloss' findings of fact were reached contrary to Section 861. The WCAC refused to correct Magistrate Sloss' findings of fact, ignoring the powers granted in *Mudel*, but rather holding that to do so would not "comport with our standard of review." (W7).

It is Defendant's position that the one most immediate, efficient and direct cause preceding Plaintiff's death in 2001 was the complete occlusion of his quadruple bypass. It was not his 1991 myocardial infarction. Magistrate Sloss did not make findings regarding the significant issues presented regarding the immediate cause of Plaintiff's death. The WCAC committed legal error in adopting Magistrate Sloss' lack of findings

that were already not based on competent, material, or substantial evidence on the whole record. (see Section 861(3), (4), (10), (12), & (13)).

Magistrate Sloss did not determine whether Plaintiff's immediate cause of death was the complete occlusion of the quadruple bypass - or whether Plaintiff's death was a myocardial infarction - or whether Plaintiff's death was from an arrhythmia. In regards to the occlusion, Magistrate Sloss noted Dr. Goldberg and Dr. Zobl agreed that the autopsy showed *total* occlusion of the major coronary arteries or the bypass grafts of those arteries (SS3). However, Magistrate Sloss did not thereafter mention or address the significance of that total occlusion in his analysis of what caused Plaintiff's death. Magistrate Sloss also never mentioned or acknowledged the existence of Dr. Levinson's testimony concerning the total occlusion. These discrepancies were ignored by the WCAC.

Regarding the mechanism of death, Magistrate Sloss twice identified the acute myocardial infarction that Dr. Goldberg put on the death certificate:

> The cause of Plaintiff's death was listed as "acute myocardial infarction due to coronary disease." Dr. Goldberg would not have listed this on the death certificate unless he had a reasonable certainty that it was the proper diagnosis (SS3).
>
> Plaintiff passed away on January 4, 2001, with the cause of death listed as "acute myocardial infarction" and "coronary artery disease." (SS4).

However, in making these findings of fact, Magistrate Sloss found "agreement among the medical experts" that the cause of death was something else, that it was instead an arrythmia, citing only Dr. Zobl and Dr. Levinson and omitting any reference to Dr. Goldberg's contrary opinion (SS5):

> In the instant case, there was agreement among the medical experts that Plaintiff's death was the result of a lethal arrhythmia caused by coronary artery disease and his prior myocardial infarctions. (Z48; L60).

Thereafter, Magistrate Sloss stated that "all three doctors" agreed that arrhythmia was the cause of death and that cumulative heart damage was a contributing cause of the arrhythmia (SS5):

> *All three doctors agreed* that it was a combination of underlying coronary artery disease together with the cumulative damage to the heart that began with his work-related myocardial infarction in 1991 that caused the fatal arrhythmia on January 4, 2001. [Emphasis added.]

As stated above, the doctors were *not* in agreement that Plaintiff's demise was due to an arrhythmia or that cumulative damage contributed to an arrhythmia. The record directly contradicts Magistrate Sloss' finding of facts.

Concerning the testimony of Dr. Levinson, Defendant is of the opinion Dr. Levinson could not have been more explicit in that Plaintiff's immediate cause of death was the occlusion of the bypass grafts and not related to the 1991 heart attack.

Dr. Levinson identified the immediate cause of death as the total, multi-vessel occlusions:

> If you look at the immediate cause, it was absolutely because of the total shutdown and closure of all four new coronary artery bypass grafts (L23).

The only theory Dr. Levinson could offer for the total shutdown was the severe coronary *artery* disease—he did not include *ventricle* damage as a possible contributor:

> Well, that's a very—it's unusual to have all of the vessels or all of the bypasses shut down. I can tell you that the usual cause of why that happens is that there is severe coronary artery disease distal to the bypass so-called poor run off.

If you're bypassing into poor vessels and you don't have adequate circulation beyond the bypass then there is a risk of not having those bypasses stay open. That's the most common cause for why bypasses shut down. (L33).

Dr. Levinson also said that the severe coronary artery disease was sufficient in and of itself to have caused Plaintiff's demise, and to include prior heart damage as a factor was merely one of a number of possibilities:

Q. So just for the record what would be your opinion as to the overall cause of Mr. Paige's demise, directly and secondarily?

A. Progression of coronary artery disease in a high risk profile patient culminated in the unfortunate sudden death event which occurred post bypass, possibly precipitated by closure of all grafts.

However, he had enough going in the sense of underlying coronary disease that it could have been that in and of itself, but probably related somehow to sudden closure of the bypass grafts.

Again, that's conjectural, but ultimately secondary to a malignant arrythmia with either ventricular fibrillation, sustained ventricular tachycardia or even possibly deteriorating to asystole cause by the presence of ischemia, reinfarction or reinjury secondary to previous cardiac damage, A, B, C or all of the above (L33-34).

As stated previously, Magistrate Sloss made no reference to any of this testimony by Dr. Levinson regarding Plaintiff's immediate cause of death.

Dr. Goldberg never said that cumulative damage was a cause of Plaintiff's fatal arrhythmia. Nowhere in Magistrate Sloss' decision did Magistrate Sloss identify testimony by Dr. Goldberg to support his ultimate finding that "[a]ll three doctors" agreed that cumulative damage was a cause of a fatal arrhythmia; Dr. Goldberg never said that.

Dr. Goldberg testified that he did not have the information in his chart to be able to explain at the time of his deposition why he had listed an *acute myocardial infarction* as the immediate cause of death, but he did say he would not have put that diagnosis on the death certificate unless he was reasonably certain of it (GG19).

Dr. Goldberg went on to say that, whether Plaintiff died of a myocardial infarction or died of some other cardiac event, such as an arrhythmia, the occlusion (total blockage) of the four bypass grafts could explain what happened (GG20). This supports Dr. Goldberg's prior opinion in the prior proceeding that a 90% occlusion in just one artery would be enough to alone cause an infarction:

> [T]he report indicated 60 percent stenosis in the left anterior descending artery in his mid portion and 50 percent stenosis in the posterior descending branch of the right coronary artery. ...
>
> ... Infarction can occur in this setting without some form of stress, but the fact that he was performing work which was physically and emotionally stressful and the fact that narrowings of these degrees were present in his arteries to me suggests that the work stress precipitated the infarction with his pre-existent coronary artery disease. *If the narrowing in the coronary artery in the left anterior descending coronary artery had been shown to be 90 percent, then it would be more a situation in which infarction could occur in the absence of stress* (G9-10) (emphasis added).

Dr. Goldberg was forced to associate multiple possibilities and theories that would have occurred in order to conclude any possible causal relationship between Plaintiff's death and heart damage from a 1991 myocardial infarction:

> [A]ny damage to the left ventricle from any of his myocardial infarctions *could* have contributed in an accumulative effect to cause dysfunction of the left ventricle which *could* then contribute to his demise (GG22).
>
> Any damage like that *can* contribute to damage from other myocardial infarctions which subsequently occur, so that cumulatively the damage from each of the myocardial infarctions *can* contribute to the overall dysfunction of the left ventricle and *can* then play a role in subsequent problems or risk of subsequent events (GG23).

Dr. Goldberg himself never offered an affirmative opinion that Plaintiff's demise was because of an arrhythmia or had anything to do with a left ventricle dysfunction. Dr. Goldberg did not include arrhythmia or left ventricle dysfunction on the death certificate.

Dr. Zobl said that he could not be certain of the immediate cause of Plaintiff's death. Dr. Zobl reported that the autopsy report was not clear on the cause of death, and an arrhythmia was only one of many possibilities:

> He apparently had a sudden cardiac event. Exactly what that event was is not clear. Certainly the autopsy would admit of any number of catastrophes that might have occurred (Z 42).

Dr. Zobl testified as follows concerning :

Q. You indicate in your report in your last paragraph "It is uncertain as to the nature of the final terminal cardiac episode." Why do you make that statement?

A. Well, apparently he died suddenly during his sleep and was discovered. He was taken into the emergency room, but resuscitation was unsuccessful. So this would classify as an episode of sudden death.

It's possible that he had a third myocardial infarction. ...

He may have had a lethal arrhythmia.

Q. That is what?

A. An episode of ventricular fibrillation. That is a cardiac arrest brought on by a severe ischemic episode.

So it's very difficult to determine the exact mode of his sudden death. But *the autopsy showed that all of his carotid arteries and bypass grafts were all closed. So he certainly was in serious condition.* (Z14) (emphasis added).

Dr. Zobl said that the mechanism of Plaintiff's first heart attack was the complete occlusion of a single coronary artery due to a thrombus "and, therefore, myocardial infarction" (Z28). Dr. Zobl said that the second heart attack was because of two different "culprit arteries" that were so occluded that a thrombus may not have been necessary (Z37-38). Obviously, Plaintiff's condition in January 2001 at the time of death was several times worse than what had triggered two (2) prior heart attacks. It goes

without saying that occlusion of *four* major arteries and bypass grafts would, therefore, trigger a massive heart attack.

Ultimately, Dr. Zobl had this to say about "the proximate cause" and "a proximate cause":

> A. I think it is most likely that that was an arrhythmia; although, I think we can't determine exactly what it was.
>
> Q. All right. And *the proximate cause* of that arrhythmia is the coronary artery disease, correct?
>
> A. Yes.
>
> Q. And is *a proximate cause* of that arrhythmia also the left ventricular damage that he suffered back in 1991?
>
> A. Yes. (Z48) (emphasis added).

Thus, Magistrate Sloss' award in this case, if based on Dr. Zobl's testimony, is directly contrary to the plain language of the Act. The WCAC affirming Magistrate Sloss is directly contrary to Section 861 and the fact finding powers vested in the WCAC pursuant to *Mudel*. The WCAC conceded the medical testimony was in direct conflict with Magistrate Sloss' findings.

The speculation that would be required in this case does not satisfy the standard of "the proximate cause." An apt analogy for proximate cause analysis is found in *McGuire v Rabaut*, 354 Mich 230, 240 (1958), where the Supreme Court cited a "classic" proximate cause case:

> The deficiency in plaintiff's case lies in the area of proximate cause. We need no more than cite the classic case of *Stacy v Knickerbocker Ice Co*, 84 Wis 614 (54 NW 1091), wherein it was held that negligence in failing to fence thin ice was not a cause of the death of runaway horses which a fence could not have halted had it been there.

In this case, where Plaintiff in 2001 suffered total occlusions of the major coronary arteries and/or their bypass grafts due to Plaintiff's underlying heart disease, those were like the runaway horses in *Stacy*. If Plaintiff had not suffered heart damage from the work-related 1991 injury, would healthy heart muscle have been a fence that would stop the total occlusions from doing their deadly work? The answer to that is clear from the record in this case, the total occlusions were sufficient in and of themselves to cause Plaintiff's death.

It is important to note that no expert witness opined that it was not the total occlusions that caused Plaintiff's death. At most, the contribution of left ventricular damage to a fatal arrhythmia was a possibility, and it was not the preferred possibility by the treating physician, Dr. Goldberg, when completing the death certificate.

In *McCoy v Michigan Screw Co*, 180 Mich 454 (1914), at a time when proximate cause analysis was applied to the "arising out of and in the course of" issue, the Supreme Court reversed an award on the basis that there were two "just as reasonable" inferences that could be drawn—one favoring compensation and one not; therefore, the award was based on speculation and could not stand.

In *McCoy*, Plaintiff lost his eye after rubbing it and thus infecting it. Plaintiff claimed that the occasion for rubbing it was that he had irritated it at work when some steel flecks flew into his eye. The medical testimony indicated that if Plaintiff had rubbed it for any reason, whether or not it was irritated by the steel flecks, the infection could have been introduced. On those facts, the Court held that the loss of the eye was "directly and immediately due" to the infection, and Plaintiff failed in his burden of proof because it would have taken a guess to attribute the infection to the work injury.

Similarly, in *Byrne v Clark Equipment Co*, 302 Mich 167 (1942), it was claimed that the work injury was the occasion for the surgery that resulted in the infection. The deceased had sustained a hernia at work and underwent surgical repair, during which operation the surgeon also removed a chronic appendix. The medical proofs were simply inadequate to establish beyond speculation whether the infection came from the hernia repair, or the appendix removal, or both.

Defendant submits that, pursuant to this caselaw, benefits should be denied not only under the *Robinson* definition of "the proximate cause," but also under the *Hagerman* definition.

However, even if the *Hagerman* analysis is used, Magistrate Sloss' findings and conclusions were erroneous. Subsequently, the WCAC committed legal error adopting Magistrate Sloss' faulty legal analysis. Magistrate Sloss stated:

> It is the inescapable conclusion from the testimony of all three doctors in this matter that Plaintiff's demise is directly traceable to the initial work-related injury in 1991. All three doctors agreed that it was a combination of underlying coronary artery disease together with the cumulative damage to the heart that began with his work-related myocardial infarction in 1991 that caused the fatal arrhythmia on January 4, 2001. I therefore conclude and find as fact that Plaintiff's work-related myocardial infarction in 1991 was the proximate cause of his death for purposes of Section 375(2) of the [A]ct. (SS5).

Defendant submits that Magistrate Sloss' analysis fails because the evidence cited to establish that Plaintiff's death was "directly traceable" to the injury does not prove that Plaintiff's death was "directly caused" by the injury. *Hagerman* did at least require proof of causation.

Regarding Dr. Levinson, Magistrate Sloss put aside what Dr. Levinson identified as primary and relied on the following brief exchange on cross examination:

Q. Okay. Is cardio—excuse me—coronary artery disease coupled with his left ventricular damage proximate cause of the arrhythmia that he suffered in January of 2001?

A. Yes. In a simplistic generic primary sense, yes, without getting complicated. Yes. (L60-61).

Magistrate Sloss misinterpreted this testimony. Exactly what the doctor meant cannot be known from this diminutive quote. This quote was completely taken out of context by Magistrate Sloss and adopted by the WCAC. To signify the intent of Dr. Levinson's testimony, this is what he said:

Q: Okay, taking Mr. Paige's case, do you have an opinion whether left ventricular damage coupled with the remodeling that his heart - - well, let me ask you this question first. We talked about remodeling and you felt - - what did you feel about Mr. Paige's heart and the remodeling process?

A: Well, like I said before, initially, in terms of his initial myocardial infarction there was very little remodeling that had to be done because it was a small area in the apex that was involved and that was not usually enough to make a big deal out of the remodeling process.

As the disease progresses over time, as a recurrent myocardial infarction occurs there's more remodeling that occurs.

Q: Taking this remodeling and the damage that had been done could this lead to further ischemia?

A: It's possible.

Q: Do you have an opinion whether or not it did in Mr. Paige's case?

A: Well, I think we have to say yes because he had a second myocardial infarction. So I think the proof of the pudding, so to speak, is the fact that he did have a second myocardial infarction and that occurred fro a reason and that was document as progression of disease because he had a cardiac cath which then let to a bypass, which he wasn't a candidate for in '91. So obviously there was a progression of disease.

Q. Okay. Is cardio—excuse me—coronary artery disease coupled with his left ventricular damage proximate cause of the arrhythmia that he suffered in January of 2001?

A. Yes. In a simplistic generic primary sense, yes, without getting complicated. Yes.

Q: And in reviewing Doctor Goldberg's notes there was some discussion that between April of 1991 and October of 2000 that he didn't really have any complaints of chest pain.

Is that significant in any way?

A: Well, again, chest pain is a marker for ischemia and if you don't have any chest pain we have to assume, you don't have any excessive shortness of breath, you're not having any excessive arrythmia, etc., we have to assume that the patient is not having active ischemia. (L59-61).

There is no reasonable basis to conclude that Dr. Levinson's agreement satisfied the *Hagerman* test. Magistrate Sloss' interpretation is totally inconsistent with the intent of Dr. Levinson's testimony. Dr. Levinson's plain language testimony demonstrates that he was clearly not agreeing to a *direct cause* between the left ventricular damage and Mr. Paige's demise. Rather, Dr. Levinson explicitly denied a direct cause:

> Going back to the initial situation, the myocardial infarction going back to October 1991, *it did not have a direct cause on his demise*, as stated above (L23) (emphasis added).

Dr. Levinson also explained why he believed there was not a direct cause (L36). And on cross examination of his opinion that the left ventricular damage was not a direct cause, Dr. Levinson explained at length the questions that remained about the nature, etiology and severity of the ventricle damage since 1991 (L42-47).

Regarding the treating cardiologist, Dr. Goldberg, the Magistrate found the following support (SS5):

> Dr. Goldberg testified that damage to Plaintiff's heart from his work-related myocardial infarction <u>could</u> have contributed to his death:
>
> "... any damage to the left ventricle from any of his myocardial infarction <u>could</u> have contributed in an accumulative effect to cause dysfunction of the left ventricle which <u>could</u> then contribute to his death." (G22).

This analysis "traces" Plaintiff's death back to a 1991 injury through two "could" statements. This does not establish *direct cause*.

Dr. Goldberg acknowledged there were questions regarding the etiology of the ventricular damage. Dr. Goldberg did not rule out that Plaintiff's heart had regained normal movement before the 2000 heart attack and that the hypokinesis was a result of the second heart attack or the progression of the coronary heart disease (GG13). Furthermore, the immediate cause of death was *never* identified by Dr. Goldberg as an arrhythmia—that was merely a possibility different from what he listed on the death certificate. Thus, Magistrate Sloss has gone beyond the evidence in characterizing Dr. Goldberg's testimony as agreeing that left ventricular damage contributed to a fatal arrhythmia.

Dr. Zobl was the only medical witness to affirmatively state that the left ventricular damage was "a" proximate cause of Plaintiff's death. In support of that opinion, Dr. Zobl stated that it was a "significant factor" in the death. Regarding Dr. Zobl's testimony, the Magistrate did not make a finding that it was more persuasive than the other medical witnesses. Magistrate Sloss simply found that Dr. Zobl's testimony was in agreement with the other doctors. Thus, there is no particular deference that should be given to the opinion of Dr. Zobl. To the contrary, Dr. Zobl was the one medical witness to have never seen Plaintiff and Dr. Zobl's opinion regarding causation departs in comparison from any common opinion held by the three testifying doctors.

Dr. Zobl opined that cumulative damage resulting in reduced overall cardiac function was the most significant factor in Plaintiff's *prognosis* (Z14). By that Dr. Zobl

seemed to mean that, if a person survives a first heart attack, statistically that person is less likely to survive a second heart attack (Z15). Dr. Zobl said that he could not explain that statistic fully, and indeed he gave no explanation (Z19). Subsequently, Dr. Zobl acknowledged that the term "risk factor" does not necessarily equate with causation (Z47). Whether a risk factor, even a substantial one, will satisfy the meaning of the term "directly traceable" from the common law of negligence, it does not establish direct cause. Dr. Levinson directly commented on the ambiguity of the statistic—the first heart attack brings to light the coronary artery disease which continues to progress independently thereafter (L36). Thus, the *statistic* of increased risk will not isolate the specific cause for a *particular individual* (L48-49).

Dr. Zobl did describe a causative process, but he never showed how it would apply to this case. He identified four steps leading to a fatal cardiac event: (1) damage, (2) remodeling, (3) hypertrophy making the heart work harder and requiring more blood supply and (4) reduced function due to lack of adequate blood supply (Z18). The causative effect of these four steps can be seen in an example Dr. Zobl gave involving an acute, stressful episode:

> That's a little difficult to speculate on. There is certainly no question that an acute, very stressful episode will increase blood pressure and heart rate and thereby impose an increased workload on the heart, which the heart if it's considerably diseased may not be able to accommodate. (Z 23).

But Dr. Zobl never showed that this process in fact occurred in this case.

Dr. Zobl did testify to steps one through three, but his emphasis on the amount of hypertrophy and the implication from that hypertrophy that there was reduced function is out of sync with the testimony from the treater, Dr. Goldberg, and Dr. Levinson. There was not direct proof of reduced function—Plaintiff's visits to Dr. Goldberg and Dr.

Levinson indicated that he was stable and doing well as indicated by his EKGs and his histories. Moreover, Dr. Zobl never discounted the role of the complete occlusions of the major coronary vessels and bypass grafts, which is a different process than the one Dr. Zobl described—the massive shut-down of the blood supply to the heart that those occlusions would cause renders irrelevant any discussion of the heart's ability to accommodate an increased demand for blood due to stress or exertion.

In conclusion, Defendant submits that, even under the *Hagerman* standard, Magistrate Sloss did not properly apply that standard; Magistrate Sloss resorted to speculation to find the necessary proximate cause, and the findings that Magistrate Sloss did make are not supported by competent, material and substantial evidence on the whole record. The WCAC committed legal error in adopting Magistrate Sloss' misapplication of the legal standards.

II

PLAINTIFF'S SON IS NOT ENTITELD TO 500 WEEKS OF DEATH BENEFITS PURSUANT TO SECTION 375. [12]

The WCAC committed legal error when it determined Plaintiff's son, Adam, was a dependent and entitled to death benefits beginning at the age of 17½ years old. The WCAC held Adam was a dependent at the time of Plaintiff's 1991 injury, when Adam was 8 years old. However, the WCAC awarded Adam 500 weeks of death benefits from the date of Plaintiff's 2001 death when Adam was 17½ years old. At no time was a factual determination reached concerning whether Adam was partially or wholly dependent after he reached the age of 16. The WCAC's order awards Adam death benefits for 500 weeks after Plaintiff's death in 2001 – entitling Adam to death benefits until he is approximately 28 years old.

In 2003, Magistrate Sloss determined Plaintiff was entitled to statutory death benefits pursuant to Section 321 because Plaintiff had a dependent. [13] Magistrate

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[12] Section 375 states:

(1) the death of the injured employee before the expiration of the period within which he or she would receive weekly payments shall be considered to end the disability and all liability for the remainder of such payments which he or she would have received in case he or she had lived shall be terminated, but the employer shall thereupon be liable for the following death benefits in lieu of any further disability indemnity.

(2) If the injury received by such employee was the proximate cause of his or her death, and the deceased employee leaves dependents, as hereinbefore specified, wholly or partially dependent on him or her for support, the death benefit shall be a sum sufficient when added to the indemnity which at the time of death has been paid or becomes payable under the provisions of this act to the deceased employee, to make the total compensation for the injury and death exclusive of medical, surgical, hospital services, medicines, and rehabilitation services, and expenses furnished as provided in sections 315 and 319, equal to the full amount which such dependents would have been entitled to receive under the provisions of section 321, in case the injury had resulted in immediate death. Such benefits shall be payable in the same manner as they would be payable under the provisions of section 321 had the injury resulted in immediate death.

Sloss determined Adam's dependency as of the date of Plaintiff's October 12, 1991 injury, pursuant to Section 341. [14]

On appeal, the WCAC recognized Plaintiff had one (1) dependent born July 28, 1983. Adam was 8 years old when Plaintiff suffered his first heart attack on October 12, 1991 (W3). Adam was 17 years old when Plaintiff died in 2001. Adam was a conclusive dependent under the age of 16 at the time of Plaintiff's injury but over the age of 16 at the time of Plaintiff's 2001 death (W10).

The WCAC held:

> Since the present case also involves a dependent child who was under 16 at the time of his father's death, defendant maintains that *Runnion* rules out that child as a conclusively presumed dependent and makes necessary a fact determination about the extent of dependency (W10).

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[13] Section 321 states:

If death results from the personal injury of an employee, the employer shall pay, or cause to be paid, subject to section 375, in 1 of the methods provided in this section, to the dependents of the employee who were wholly dependent upon the employee's earnings for support at the time of the injury, a weekly payment equal to 80% of the employee's after tax average weekly wage, subject to the maximum and minimum rates of compensation under this act, for a period of 500 weeks from the date of death. If at the expiration of the 500-week period any such wholly or partially dependent person is less than 21 years of age, a worker's compensation magistrate may order the employer to continue to pay the weekly compensation or some portion thereof until the wholly or partially dependent person reaches the age of 21. If the employee leaves dependents only partially dependent upon his or her earnings for support at the time of injury, the weekly compensation to be paid shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as 80% of the amount contributed by the employee to the partial dependents bears to the annual earnings of the deceased at the time of injury.

[14] Section 341 states:

Questions as to who constitutes dependents and the extent of their dependency shall be determined as of the date of the injury to the employee, and their right to any death benefit shall become fixed as of such time, irrespective of any subsequent change in conditions except as otherwise specifically provided in sections 321, 331 and 335. The death benefit shall be directly recoverable by and payable to the dependents entitled thereto, or their legal guardians or trustees. In case of the death of a dependent . . .

. . .

Section 341 of the Act clearly provides that questions about who qualifies as a dependent and to what extent they are dependent are determined:

> ". . . as of the date of injury to the employee, and their right to any death benefit shall become fixed as of such time, irrespective of any subsequent changes of conditions except as otherwise specified in sections 321, 331, and 335." [15]

Section 321 sets forth the 500 week death benefit for those who were wholly dependent upon the employee and further provides that said payments are to commence at the date of death. That section goes on to indicate that:

> [. . .] <u>If the employee leaves dependents only partially dependent upon his or her earnings for support at the time of injury,</u> [. . .]

We read the italicized portion of Section 321 as confirming the language in Section 341, which fixes both the fact and extent of dependency on the date of injury. (W10-11).

The WCAC recognized the language of Sections 331(b)[16] and 341 is contradictory when determining dependency issues. The WCAC noted Section 331(b)

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[15] Section 335 states:

(1) . . . Where, at the expiration of the 500-week period, any such wholly or partially dependent person is less than 18 years of age, a worker's compensation magistrate may order the employer to continue to pay the weekly compensation, or some portion thereof, until such wholly or partially dependent person reaches the age of 18. The payment of compensation to any dependent child shall cease when the child reaches the age of 18 years, if at the age of 18 years he or she is neither physically nor mentally incapacitated from earning, or when the child reaches the age of 16 years and thereafter is self-supporting for 6 months . . .

[16] Section 331 states:

The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

(a) a wife upon a husband with whom she lives at the time . . .

(b) A child under the age of 16 years, or over 16 years of age if physically or mentally incapacitated from earning upon the parent with whom he or she is living at the time of the death

states ". . . a conclusive dependent is defined in Section 331(b) as a ". . . child under the age of 16 years . . ." The statute goes on to reference ". . . the time of the death of the parent" as the time to measure the age of the dependent in question." (W12). The language of Section 341 states the date of injury is the date to determine dependency.

After reviewing *Murphy v Ameritech,* 221 Mich App 591(1997), the WCAC held:

> We interpret *Murphy* to stand for the proposition that where there is a child under the age of 16 at the time of injury, it is at that point that Section 341 operates to identify the dependent and to establish to what extent they are dependent. Such a finding was made in this matter by Magistrate Miller's decision, mailed June 28, 1993. That finding of conclusive dependency became final 30 days thereafter. *Murphy* clearly provides that once a conclusive dependent under the age of 16 is identified, they are automatically entitled to the 500 week death benefit provided under Section 321. *Murphy* lists no corollary that conclusive dependent who turn 16 during that 500 week period are subject to being reclassified as partial dependents. We decline to wander from the framework of that ruling.
>
> Magistrate Sloss'(s) opinion, mailed February 25, 2003, did not grant benefits on an open award basis. Rather, he ordered the 500 week death benefit. As the order did not involve payment of benefits for any period after 500 weeks, there is no error in his not reviewing Adam's extent of dependency. *Murphy* does permit a review of the extent of dependency in cases where the child dependent is over 16 when the 500 weeks expire, requiring that the child prove a "continued need" for benefits. In this case the award did not exceed that 500 week period.

Murphy, supra, is distinguishable from the present case. In *Murphy,* Plaintiff's death was immediate; there was no determination of disability, or the payment of disability benefits, before death benefits were paid or dependents determined at the time of death. All dependents were fixed as of the date of death. There was no question as to the survivors' dependency status as of the date of death or the age of the dependents at the expiration of 500 weeks. The *Murphy* dependents were ages 9 and 13 at the expiration of the 500 weeks. Clearly, the dependents were conclusively

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of the parent . . . In all other cases questions of dependency , in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury . . .

dependent on the date of death and had not yet reached the age of 16 at the expiration of the 500 weeks.

Section 331 is applicable for the determination of dependency only at that time of death; Section 331 is not applicable for the determination of death dependents subsequent to a determination of disability and/or disability benefit dependents.

Contrary to *Murphy,* Plaintiff's death was not immediate; conversely, there was a determination of disability and disability benefits were paid to Plaintiff years before Plaintiff died in 2001. This was more than ten years before death benefits were sought or death benefit dependents were determined. There were no dependents fixed as of the date of Plaintiff's death. Adam's dependency status was – and remains - unknown as of the date of Plaintiff's death. There was no determination that Adam was conclusively dependent on Plaintiff on the date of Plaintiff's death. Adam had reached the age of 16 and was beyond the presumption.

In 2003, Magistrate Sloss, applying Section 341, did not consider any specific provisions in Section 321, 331 or 335, but simply held that Adam was a dependent because Magistrate Miller had so previously ruled:

> In this case, Magistrate Miller ruled that Adam Paige was a dependent of Plaintiff on the initial date of injury, October 12, 1991, therefore Defendant is responsible for death benefits pursuant to Section 375(2) of the Act. (SS4).

As outlined above, Section 331(b) specifically provides for dependency determinations in death cases different from dependency determinations in Section 353. These determinations must be reached in order to calculate the correct weekly benefit amount pursuant to Section 321.

Pursuant to Section 331, it is not enough to simply be "dependent"; who receives death benefits and in what amount depends on additional findings – such as whether the dependent is *wholly* dependent or *partially* dependent. To be wholly dependent *as a matter of law*, a child must be "under the age of 16 years, or over 16 years of age if physically or mentally incapacitated from earning upon the parent with whom he or she is living *at the time of the death* of that parent" [emphasis added]. Otherwise, "questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury."

In 1993, for the purpose of Section 353 in the *disability* case, Adam's "dependency" was conclusive. He was born July 28, 1983 and the injury date was October 12, 1991, when Adam was 8 years old. Indeed, dependency was not an issue in the disability case, and Magistrate Miller made no findings in his Opinion regarding Adam's dependency. Obviously, there were no factual findings made by Magistrate Miller about being wholly or partially dependent, because those are concepts foreign to a disability case and Section 353. Thus, Magistrate Miller's 1993 decision does not excuse a determination of whole or partial dependency pursuant to Section 331 in this case claiming benefits for a death in 2001, when Adam had exceeded 16 years of age.

As stated above by the WCAC, and directly on point, is *Runnion v Speidel*, 270 Mich 18, 24 (1934), where the Supreme Court held:

> [T]o be entitled to the conclusive presumption they must be within the class [of dependency] on the date of injury *and under the age of 16 at the time of their father's death*.

In *Runnion*, as here, the dependent children were under the age of 16 at the time of their father's injury but over the age of 16 at the time of his death. The Court held that

"neither may recover on the ground that they are conclusively presumed to be wholly dependent upon the deceased employee." Whether the dependency was in whole or in part was a question of fact, and so it is a question of fact in this case as well.

In this case, there has been no finding of fact as to whether Adam was wholly or partially dependent on his father at the time of the October 12, 1991 injury or at the time of the January 4, 2001 death. All Magistrate Miller noted in 1993, commenting on another issue, was that "Plaintiff is married and is the father of 3." Mrs. Paige was not claimed as a dependent under Section 353, pursuant to which dependency of a spouse is determined by whether the person receives half or more of his or her support from the injured employee. The fact question of the extent of Adam's dependency in 2001 at 17 years old, whether whole or partial, remains to be answered—how much did Adam depend on his father and how much did he depend on his mother?

There is no record in this case that will support the necessary finding of fact of whole or partial dependency as required by Section 331 in order to be able to compute the correct weekly amount under Section 321. See *Lesner v Liquid Disposal*, 466 Mich 95 (2002). Magistrate Sloss ordered the maximum benefit without any finding of fact or conclusion of law that Adam's dependency was whole rather than partial. Thus, the order of a maximum benefit is defective and cannot stand. The WCAC committed legal error in affirming Magistrate Sloss' opinion and not remanding these issues for further findings.

III

DEFENDANT IS ENTITLED TO SET OFF "LIKE BENEFITS" PAID TO PLAINTIFF PURSUANT TO SECTION 161 AGAINST THE DEATH BENEFITS AWARDED PURSUANT TO SECTION 321

The WCAC committed legal error in not determining the death benefits awarded pursuant to MCL 418.375 constitute a weekly payment from the date of death until 500 weeks from the date of the 1991 injury, and any payments paid or payable from the 1991 date of injury are subject to Section 161.

In 1993, Magistrate Miller granted Plaintiff an open award. Magistrate Miller held:

> . . . benefits being received by [P]laintiff from the City of Sterling Heights are "like benefits" and Section 161 of the Act applies to [P]laintiff. (M7).

In 2003, Magistrate Sloss opined the following:

> Defendant asserts that under Section 375(2) the set-off it is entitled to is the number of *weeks* of benefits it previously paid, rather than the *amount* of benefits previously paid. Such an interpretation cannot be maintained given the plain language of the statute. The statute refers to the death benefit being a "sum" to be set-off against the "indemnity which at the time of death has been paid," and that it should be "equal to the full amount which such dependents . . . would have been entitled to receive." MCL 418.375(2) (parallel citations omitted). These phrases all indicate the payment of money, rather than the running of a period of time. Accordingly, Plaintiff is entitled to 500 weeks of weekly benefits, less compensation previously paid by Defendant. MCL 418.321 (parallel citations omitted) (SS6).

In *Crowe v City of Detroit,* 465 Mich 1 (2001), the Court held that disability benefits provided by the City's charter were "like" Workers' Disability Compensation Act benefits. *Crowe* at 9. Citing *McKay v Port Huron,* 228 Mich 129 (1939), the Court held:

> The term "like benefits", employed in the statute, does not mean identical benefits or co-extensive in every detail but, considering the full scope thereof, similar in its salient features. *Id.*

Subsequently, in *Johnson v Muskegon,* 61 Mich App 121 (1975), the Court stated:

. . . salient feature in *MacKay* was held to be precisely the salient feature in the case at bar, periodic payments for disability . . . Like *MacKay*, the benefits in this case are not "identical" or "co-extensive in every detail," nor are they required to be. *Id.* at 9-10.

In *Moore v City of Southfield,* 160 Mich App 289 (1987), the Court determined whether Plaintiff police officer was entitled to workers' compensation benefits and duty disability from Plaintiff's pension plan. The Court held:

> We conclude that the Legislature intended that an otherwise eligible policeman or fireman under age fifty-five is entitled to both workers' compensation benefits and [Defendant's] duty disability pension benefits, and may accept benefits under both acts, to the extent that they do not provide overlapping or double compensation for the same injury. The clear purpose of Section 161 is to prevent policeman and fireman from accepting double benefits for the same injury.
>
> Section 161 states:
>
> (c) Police officers, fire fighters, or employees of the police or fire departments, or their dependents, in municipalities or villages of this state providing like benefits, may waive the provisions of this act and accept like benefits that are provided by the municipality or village but shall not be entitled to like benefits from both the municipality or village and this act . . .

Section 375(1), *supra,* provides that, in case of non-immediate death, death benefits become a substitute for further disability indemnity. Section 375(2), *supra*, then provides that the death benefits are limited by what disability benefits were either paid *or payable,* and further, the manner in which such death benefits are themselves payable is dictated by Section 321, *supra*.

Had Plaintiff's October 12, 1991 heart attack resulted in *immediate* death, death benefits would have been payable weekly and subject to the rate tables for 500 weeks from the date of injury pursuant to Section 321.

Magistrate Sloss selected three terms or phrases from Section 375(2) to conclude that set-off for indemnity does not involve the running of a period of time but

rather the actual amount of weekly wage loss benefits paid to the employee during his lifetime (SS6). The WCAC affirmed this conclusion.

By attempting to give effect to the apparent plain language of selected terms or phrases in one subsection, the Magistrate denied effect to other language in the same statute pointing to a different result. The Magistrate's choice, affirmed on appeal by the WCAC, also results in double liability imposed on Defendant—a result that is abhorrent to the principles of the Act. *Lane v Combustion Eng'g, Inc*, 1998 ACO #47; MCL 418.161(1)(*l*). Defendant followed the law as written and the Magistrate's orders as issued. Defendant did not "pay" Plaintiff worker's compensation benefits, although benefits were "payable", from 1991 to 1998 because Section 161 allowed for Defendant to coordinate "like benefits" and prevented Plaintiff from receiving double payments. Subsequently, after Magistrate Sloss' 2000 opinion and order, Section 354 allowed for Defendant to coordinate Plaintiff's retirement pension benefits. Why is Defendant being punished for following the law and the Magistrate's Orders? Why is Plaintiff now entitled to double recovery? Benefits "payable" are also subject to set off and coordination (discussed *supra).* Section 375 was not applicable at the time Defendant paid was required to pay Plaintiff's benefits; Plaintiff was living.

The WCAC, citing *Boyer v Monarch Welding & Engineering,* 1996 ACO #229, stated the following in support of affirming Magistrate Sloss.

> The application of Sec. 375(2) to the circumstances herein requires payment of the full amount that Mr. Paige would have been entitled to receive under Sec. 321, which benefits are not subject to coordination under Sec. 354(1)(e). We therefore find no error in the magistrate's findings and legal conclusions as to this issue . . . (W17).

It should be noted that *Boyer* has never been cited again, by either the WCAC or this Court. Further, because *Boyer* is a WCAC decision, it is not controlling. In any event, *Boyer* is distinguishable from the present case because *Boyer* did not concern the payment of like benefits pursuant to Section 161. Specifically, Plaintiff was paid like benefits and paid a wage continuation by Defendant until Magistrate Sloss' 2000 opinion and order. Magistrate Sloss' decision and the WCAC's opinion and order is contrary to the spirit of the law and the Workers' Compensation Disability Act.

The Supreme Court has held death benefits pursuant to Section 375 are weekly payments for weeks after the death until 500 weeks from date of injury. [17]

In summary, the result was always that dependents did not get *death* benefits for weeks that the employee was *alive*. Furthermore, it always inured to the employer's benefit that it had satisfied its liability to the employee during his or her lifetime, not

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[17] See *King v Munising Paper Co*, 224 Mich 691 (1923), dependents received the maximum rate only for weeks after the date of death until 300 weeks from the date of injury; *Long v Isle Royale Copper Co*, 238 Mich 436 (1927), dependents awarded the maximum weekly rate for 14 weeks only—from date of death until 300 weeks from the date of injury; *Anderson v Fisher Body Corp*, 239 Mich 506 (1927), payments must begin as of the date of death and continue for not more than 300 weeks from the date of injury; *Duvall v Ford Motor Co (On Rehearing)*, 288 Mich 348 (1940), the Court provided that death benefits shall commence as of the date of death and continue for 300 weeks from the date of injury; *Neumeier v City of Menominee*, 293 Mich 646 (1940), plaintiff awarded benefits beginning with the date of death for 300 weeks from the date of injury; *Wolanin v Chrysler Corp*, 304 Mich 164, 168 (1943), 300 weeks from the date of the injury; *Kortz v Manistee County Road Commission*, 304 Mich 518 (1943), death benefits should have been awarded "only for that part of the 300 weeks following the injury which remained after the date of his death."; *Tidey v Riverside Foundry & Galvanizing Co*, 7 Mich App 40 (1967), *aff'd* 381 Mich 551 (1969), the right to claim dependency benefits is derivative from, and accordingly is limited by, the employer's *liability* to the employee. [Footnote omitted.] 381 Mich at 553 (emphasis added).[17]

necessarily by benefits paid for the injury but sometimes by wages, by benefits paid for another injury or in light of other defenses provided by the Act. The Legislature has made no changes to Sections 321 and 375(2) that might be construed as a rejection of those cases and, hence, a justification for the Magistrate's analysis in this case.

Section 375(1) addresses the *entitlement* to death benefits in the event of non-immediate death. Section 375(2) addresses the *amount* of death benefits in two different but equally necessary ways—total amount on the one hand and a combination of weekly rate and duration on the other hand. Death benefits reflect the residual liability at the time of Plaintiff's death payable for weeks after the death subject to the maximum duration.

Under former law, a disabled employee faced a maximum number of weeks of eligibility for benefits, and in the case of a totally disabled employee, a maximum dollar amount as well. Under former law, if a total or partially disabled employee died 501 weeks after injury as opposed to 499 weeks, there simply could be no entitlement to death benefits at all, independent of any calculation of a dollar amount based on benefits paid or payable. See *Tidey*, *supra* (an independent basis for denying the claim for death benefits was that the employee died after the maximum number of weeks—750 in the case of total and permanent disability— in which disability benefits were payable).[18]

The question is raised by the plain language still present in the statute today—why would the dependent's claim for death benefits ("independent" per Section 341) be

[18] The fact that death claims are no longer excluded by reason of the expiration of a period of time in which the employee would receive disability benefits is because the Legislature changed the entitlement to disability benefits, and not because of any change in the language regarding death benefits. Thus, § 375(1) must still mean now what it meant before.

disallowed simply because of the passage of time with regard to the employee's claim? That question has been answered in *Tidey*, *supra*; although a dependent has an independent right to claim benefits, the dependent's entitlement is *derivative* of the employee's.

Another question is raised by the plain language still present in Section 375(1) today—in addition to establishing that the death claim is derivative, did the Legislature further define the nature of that derivative claim? Subsection 375(1) states that "liability for the remainder" of disability benefits are terminated on death and "death benefits" are "in lieu of any further disability indemnity." This language most naturally means weekly benefits *after* the date of death, which is consistent with further language in Section 375(2) and (3).

In the abundant caselaw discussed above, the result again and again was to restrict death benefits to weeks after the employee's death. In many of the cases, no satisfactory explanation of the statute was given to account for the result. However, reading the statute to mean that death benefits are weekly payments substituting for potential disability benefits for weeks after the employee's death accounts for the Legislature's choice of words and the result reached time and again in the caselaw.

Pursuant to Section 375(2), in the calculation of the death benefit, the reduction for disability indemnity includes what was "payable," not just what was paid. Section 375(2) refers to "the indemnity which at the time of death has been paid or becomes *payable*" [emphasis added]. Magistrate Sloss and the WCAC, however, did not referenced or apply the last quoted term, limiting application instead to only what has been "paid":

> The statute refers to the death benefit being a "sum" to be set-off against the "indemnity which at the time of death has been paid," .... (SS6).

What must be taken into account in awarding death benefits is not just indemnity benefits that were paid but also those "payable." Benefits may be payable but not in fact paid because of various set-offs—whether wages, benefits subject to coordination, like benefits, suspension due to wrongful conduct and so on. See *French v Pollock Co*, 1997 ACO #560 (Garn, Commissioner, dissenting) ("simply because benefits are 'payable' for a certain period does not mean they are 'collectible'"). This is again an instance where the caselaw discussed above has not focused on the specific statutory language, but has reached a result consistent with it. Defendant submits that an accurate assessment of the term "payable" in the first sentence of Section 375(2) was presented by Commissioner Garn in *French*, *supra*.[19]

What indemnity shall at the time of death have become payable? That has been answered in at least two sections of the Act. One, Section 5 of Part 3 [now MCL 418.801(1)] provided: "Compensation shall be paid promptly and directly to the person entitled thereto and *shall become payable* on the fourteenth day after the employer has notice or knowledge of the disability or death" [emphasis added]. Two, Section 3 of Part 2 [now MCL 418.311] provided: "[C]ompensation shall begin on the eighth day after the injury: Provided, however, That if such incapacity continues for 4 weeks or longer or if death results from the injury, compensation *shall be computed* from the date of the

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[19] In *French*, there was not a majority opinion. The two opinions agreeing to a greater death benefit relied on markedly different analyses—the first completely ignored the reduction for "payable" benefits and the second construed "payable" to be what the parties agreed was payable after applicable defenses and not what the Act defined to be payable in the first instance. Those two opinions are flawed in the manner pointed out the next year in *Lane v Combustion Eng'g, Inc*, 1998 ACO #47, erroneously focusing on what the dependent believes she herself is entitled to, and losing sight of what her decedent (the worker) was entitled to.

injury" [emphasis added]. These provisions, of course, do not contemplate that the compensation that has become *payable* or has been *computed* will necessarily be *paid*—because the Act also provides for various defenses or set-offs.

The current provision produces "the indemnity which at the time of death has been paid or [the indemnity which at the time of death] becomes payable." There is no indemnity that "becomes" payable at the time of death because Section 375(1) expressly terminates liability for *indemnity* upon death and substitutes *death benefits*. The WCAC and Magistrate Sloss completely ignored the phrase regarding "payable" benefits.

The Legislature intended to mean something by referring to "payable" benefits, that language must be given meaning. And because the Legislature is known to have intended no substantive change in rights when rewriting the Act in 1969, the many Supreme Court decisions up to 1969 are still on point in giving meaning to the current language.

In this case, indemnity was "payable" to Plaintiff since 1991 whether or not it was "paid." That conclusion is inescapable from Magistrate Miller's 1993 decision which affirmatively ordered Defendant to pay weekly benefits of $430 until further order, while recognizing that another provision in the Act (*i.e.*, Section 161(1)(c) like benefits) would result in weekly benefits not being actually paid. It is likewise inescapable from Magistrate Sloss' 2000 decision which found that Plaintiff remained entitled to weekly benefits but Defendant's liability was extinguished through coordination pursuant to MCL 418.354(1)(e). Through the end of the period of Plaintiff's disability, Defendant's liability to him pursuant to the two final orders had been satisfied. Defendant owed

nothing more for the period of disability. Therefore, death benefits can only be for the 18 weeks from Plaintiff's January 4, 2001 death until May 11, 2001 (500 weeks from October 12, 1991 injury) at the rate to be determined by Section 321 and 331.

By ordering Defendant to pay 500 weeks of death benefits to a dependent who was 17 years of age on the date of death, Magistrate Sloss' decision seriously conflicts with the clear legislative intent expressed in Section 335 that dependent children (without regard to whether they are wholly or partially dependent) *not* receive the remainder of their basic entitlement to 500 weeks of death benefits upon attaining age 18:

> The payment of compensation to any dependent child shall cease when the child reaches the age of 18 years, if at the age of 18 years he or she is neither physically nor mentally incapacitated from earning, or when the child reaches the age of 16 years and thereafter is self-supporting for 6 months. ...

In this case, there were 29 weeks and 3 days from the January 4, 2001 date of death until Adam attained 18 years of age on July 28, 2001. The Magistrate's award of $215,000 effectively orders benefits of about $7,300 per week.

To be sure, Magistrate Sloss avoided the age of majority problem on the theory that benefits for Adam began accruing on a weekly basis starting October 12, 1991, but that puts Magistrate Sloss' order in conflict with the two-year-back rule of MCL 418.381(2).

Accordingly, for all the reasons set forth above, Defendant requests that this Court order that the period in which weekly death benefits may be payable is from date of death, January 4, 2001, until 500 weeks from the October 12, 1991 date of injury, May 11, 2001. Furthermore, the amount of the weekly benefits during that time is subject to the maximum rate for a 1991 injury, *i.e.*, it cannot be $7,300 per week, and it

is also to be determined based on the level of Adam's dependency. Furthermore, the amount is subject to a determination of what Adam would have been entitled to for 500 weeks less the amount paid *or payable* to Plaintiff during the 482 weeks between date of injury and date of death. In other words, considering the extent of Adam's dependency, unless he is factually a total dependent or nearly so, he may not be entitled to a death benefit.

RELIEF

Defendant would request this Court grant Application for Leave to Appeal and reverse the Court of Appeals denying Application for Leave to Appeal, reverse the WCAC, and reverse Magistrates Sloss and Miller.

In determining whether Plaintiff's 1991 heart attack was the "proximate cause" of Plaintiff's 2001 death, the WCAC held that, although the record evidence was contrary to Magistrate Sloss' findings of fact, Magistrate Sloss' opinion that there was "proximate cause" was affirmed. This is legal error. Further, the WCAC relied on *Murphy, supra,* and that case is distinguishable from the present case.

The WCAC legally erred in finding Plaintiff's son a dependent on the date of injury yet awarded death benefits for 500 weeks from the date of death.

Finally, the WCAC erred in not taking into consideration the "like benefits" paid to Plaintiff pursuant to Section 161 from 1991 to 1998. The WCAC relied on *Boyer, supra,* a WCAC opinion that is not controlling and distinguishable from the present case.

The practical effect of the WCAC's order allowed Plaintiff to receive Section 161 "like benefits" benefits for approximately 7 years (1991 to 1998); upon Plaintiff's death in 2001, after being regularly retired from 1998 to 2001, the WCAC allowed for Plaintiff's son, 8 years old at the time of injury in 1991, to collect 500 weeks of death benefits beginning when he was 17½ years old in 2001 and continuing for the next 500 weeks – with no finding as to whether he was partially or wholly dependent at the time of Plaintiff's death. This is contrary to the spirit and the purpose of the Act. Without establishing a mental or physical disability, there is no provision in the Act permitting

Adam to receive benefits after 18 years of age pursuant to Section 341 or 21 years of age pursuant to Section 321.

Respectfully Submitted,
PLUNKETT & COONEY, P.C.

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